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DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Chapter II

USACE's Plan for Retrospective Review Under E.O. 13563.

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent and request for comments.

SUMMARY: The U.S. Army Corps of Engineers (USACE) is seeking public input on its plan to retrospectively review its Regulations implementing the USACE Regulatory Program at 33 CFR 320-332 and 334. Executive Order 13563, "Improving Regulation and Regulatory Review" (E.O.), issued on January 18, 2011, directs federal agencies to review existing significant regulations and identify those that can be made more effective or less burdensome in achieving regulatory objectives. The Regulations are essential for implementation of the Regulatory mission; thus, USACE believes they are a significant rule warranting review pursuant to E.O. 13563. The E.O. further directs each agency to periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives. Section 404(e) of the Clean Water Act authorizes USACE to development general permits, including nationwide permits (NWP), for minor activities in waters of the U.S. for a period of five years. Accordingly, every five years, USACE undergoes a reauthorization process for the NWP program and includes public notice and provides an opportunity for public hearing. Comments for the NWP program are

submitted during the reauthorization process. Therefore, USACE is currently complying with the E.O. 13563 direction to periodically review its existing significant regulations. Other regulations will be reviewed on an as-needed basis in accordance with new laws, court cases, etc.

DATES: Written comments must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by docket number COE-2011-0028, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

E-mail: regulatory.review@usace.army.mil Include the docket number, COE-2011-0028, in the subject line of the message.

Mail: U.S. Army Corps of Engineers, ATTN: CECW-CO-R (Ms. Amy S. Klein), 441 G Street NW, Washington, D.C. 20314-1000.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE-2011-0028. All comments received will be included in the public docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to

be CBI, or otherwise protected, through regulations.gov or e-mail. The regulations.gov web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to the Corps without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to www.regulations.gov . All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

FOR FURTHER INFORMATION CONTACT: Ms. Amy S. Klein, Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, Washington, D.C. 20314-1000, by phone at 202-761-4559 or by e-mail at regulatory.review@usace.army.mil.

SUPPLEMENTARY INFORMATION:

Executive Order 13563, “Improving Regulation and Regulatory Review” (E.O.), was issued to improve regulation and regulatory review, which includes public participation, integration and innovation, flexible approaches, and science. Agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand or repeal them. In accordance with the E.O., the USACE plan is to solicit comments on its Regulations to make the Regulatory Program more effective and less burdensome.

The USACE Regulatory Program’s regulations are found at 33 CFR 320-332 and 334. The current Regulations were published in the Federal Register on November 13, 1986 (51 FR 41206). These Regulations describe the fundamental procedures, policies, authorities, and guidelines of the U.S. Army Corps of Engineer’s Regulatory Program. Since the 1986 Regulations were issued, parts of these regulations have been modified. The changes that have occurred since 1986 include, but are not limited to: the Nationwide Permit regulations at 33 CFR part 330 were amended on November 22, 1991 (56 FR 59110); regulations governing the administrative appeal program at 33 CFR part 331 were added on March 9, 1999 (64 FR 11708) and March 28, 2000 (65 FR 16486); regulations addressing compensatory mitigation for losses of aquatic resources at 33 CFR part 332 were added on April 10, 2008 (73 FR 19594); further revisions to the Clean Water Act regulatory definition of dredged material at 33 CFR part 323 were made on January 17, 2001 (66 FR 4550); final revisions to the Clean Water Act definitions of fill materials and discharge of fill material at 33 CFR part 323 were made on May 9, 2002 (67 FR 31129); revisions to the Clean Water Act regulatory definition of “discharge of dredged material” Final Rule at 33 CFR part 323 were made on December 30, 2008 (73

FR 79641); updates regarding structures in fairways and anchorage areas at 33 CFR part 322 were added on Aug. 29, 1995 (60 FR 44761); a requirement for an avoidance, minimization and compensation statement in applications for activities involving discharge of dredged or fill material at 33 CFR part 325 was added on April 10, 2008 (73 FR 19670); amended Administrative Penalties on June 25, 2004 (69 FR 35518; 33 CFR part 326); the civil monetary penalty inflation adjustment rule at 33 CFR part 326 was added on June 25, 2004 (69 FR 35515); minor editorial changes to reflect the change in title of the National Ocean Service and address at 33 CFR part 325 were made on May 13, 1997 (62 FR 26230). In accordance with the E.O., the USACE plan is to solicit comments regarding the questions posed below in the Proposal Section in order to achieve the goals of the E.O. to make regulations more effective and less burdensome.

The E.O. further directs each agency to periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives. The USACE is proposing the existing five-year reauthorization process of the NWP's, general conditions, and definitions as the periodic review of regulations.

Section 404(e) of the Clean Water Act provides the statutory authority for the Secretary of the Army, after notice and opportunity for public hearing, to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States. Activities authorized by NWP's must be similar in nature, cause only minimal adverse environmental effects when performed separately, and cause only minimal cumulative adverse effect on the aquatic

environment. The NWP program is designed to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources. The NWP program allows the Corps to authorize activities with minimal adverse environmental impacts on the aquatic environment in a timely manner. The NWP program also allows the Corps to focus its limited resources on more extensive evaluation of projects that have the potential for causing environmentally damaging adverse effects.

Each five-year review of the NWPs allows for revision of the NWPs, general conditions, and definitions to facilitate clarity for the regulated public, government personnel, and interested parties, while ensuring protection of the aquatic environment. Making the text of the NWPs clearer and easier to understand also facilitates compliance with these permits, which benefits the aquatic environment.

During the NWP reissuance process, there is a request for public comments published in the Federal Register, which complies with the E.O. general principle of allowing for public participation and an open exchange of ideas. While anyone, at any time, may submit suggestions to Corps Headquarters for new NWPs or changes to existing NWPs, comments for the NWP program are normally submitted during the reauthorization process; the most recent notice requesting comments on the NWP program occurred in the Federal Register published on February 16, 2011 (76 FR 9174), with the comment period ending on April 18, 2011. Therefore, USACE is currently complying with the E.O. 13563 direction to periodically review its existing significant regulations. However, there may be additional ways in which the NWP reauthorization process may further comply with E.O. 13563.

The E.O.'s intent is to ensure that regulations are accessible, consistent, written in plain language and are easy to understand, while protecting public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. These goals are what the Regulations improvement and the periodic reissuance of the NWP program would accomplish.

PROPOSAL:

To comply with E.O. 13563, the publication of the Federal Register notice to solicit comments on how the Regulations should be evaluated for modification, streamlining, expansion, or repeal is the USACE's first step to develop a plan that ensures that the agency's regulations are effective and not burdensome. Furthermore, comments are requested pursuant to the E.O. directing each agency to periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives. The publication of the Federal Register notice to solicit comments on the existing NWP Program re-authorization process every five years is part of USACE's plan to ensure the periodic review of regulations.

Input from a wide variety of constituents is important, and applicants, affected landowners, the general public, consultants, tribal, state and local government, and other agencies are likely to have knowledge about the full effects of the regulations on people and the economy, and to offer ideas on how to streamline or improve them. This request for information will inform the USACE's decision on whether adjustment to the

regulation is necessary and appropriate, and whether additional guidance, education, or outreach would better assist the Regulation's users, agencies, and the public to address critical issues.

The URL for a website that includes the Regulations, as well as all of the Corps Regulatory Program's current regulations and supporting program data and information is http://www.usace.army.mil/CECW/Pages/reg_materials.aspx. Furthermore, each of the 38 Corps districts has issued local public notices announcing the publication of this Federal Register notice and the request for comments. The Corps will evaluate all comments received to develop its list of review priorities, and will publish a notice in the Federal Register that summarizes the comments received and lists the priorities. The website will be updated as proposed revisions and final revisions to its regulations occur.

Please e-mail your response to the questions below to regulatory.review@usace.army.mil and be sure to number your responses in association with each question. These questions are not intended to be exhaustive, and respondents are encouraged to raise additional issues or make suggestions unrelated to these questions. Respondents are also encouraged to share examples and a detailed explanation of how the suggestion will support the goals of the Regulations review process. We are seeking public comment for a period of 60 days ending [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], after which it will revise the plan and make it available to the public.

1. How should the Corps modify its Regulations to ensure that they are

serving their stated purpose efficiently and effectively? Please provide specific recommendations on edits that could be made and suggestions on appropriate outreach and timing.

2. How can we reduce burdens and maintain flexibility for participants in the regulatory process in a way that will promote the protection of waters of the United States via the improvement of the Regulations?

3. How can the process set forth in the Regulations better achieve simplified and efficient outcomes?

4. How can the Regulations be changed to better harmonize with, be consistent with, and coordinate effectively with, other federal regulations and environmental review procedures?

5. How can we ensure that information developed to support findings under the Regulations are guided by objective scientific evidence?

6. Are there better ways to encourage public participation and an open exchange of views as part of the regulatory review? Please cite specific areas where improvements could be made and indicate what tools or mechanisms might be made available to achieve this goal.

7. The NWP program allows for comment and periodic review during the reauthorization process every five years. How else can the periodic review of the NWP program be utilized to comply with this E.O.?

8. How else might we modify, clarify, or improve the Regulations to reduce burdens, promote predictability, and increase efficiency?

Authority

We are proposing to improve the Regulations and comply with the direction to perform a periodic regulatory review with the existing reauthorization of the NWP program, which were issued under the authority of Section 404 of the Clean Water Act (33 U.S.C. §1344), Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §401 et seq.), and Section 103 of the Marine Protection Research and Sanctuaries Act of 1972 (33 U.S.C. §1413).

DATE November 10, 2011_

APPROVED_____

Michael G. Enschede

Chief, Operations and Regulatory

Directorate of Civil Works

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